

JOSEPH P. RUSSONIELLO (CNB 44332)
 United States Attorney
 JOANN M. SWANSON (CSBN 88143)
 Assistant United States Attorney
 Chief, Civil Division

450 Golden Gate Avenue, Box 36055
 San Francisco, California 94102-3495
 Telephone: (415) 436-7200
 Facsimile: (415) 436-6748
 Email: joann.swanson@usdoj.gov

Attorneys for Federal Defendant

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION

PHYLLIS J. KING,

Plaintiff,

v.

FEDERAL BUREAU OF
 INVESTIGATION,

Defendant.

NO. CV 08-1919 BZ

**SPECIAL APPEARANCE
 DEFENDANT'S NOTICE OF
 MOTION AND MOTION TO DISMISS
[FED. R. CIV. P. 12(b)]**

Date: May 28, 2008
 Time: 10:00 a.m.
 Courtroom G, 15th Floor

I. NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on Wednesday, May 28, 2008 at 10:00 a.m., or as soon thereafter as may be heard, Defendant United States, specially appearing through its attorney of record, will and hereby does move to dismiss the complaint for lack of subject matter jurisdiction, pursuant to Federal Rule of Civil Procedure 12(b)(1). Specifically it purports to name as the Defendant The Federal Bureau of Investigation, an agency of the United States. Under the Federal Tort Claims Act, 28 U.S.C. § 2470, et seq. (FTCA"), the United States is the only proper Defendant and should be substituted for The Federal Bureau of Investigation. See 28 U.S.C. § 2679(a). This motion will be heard in Courtroom No. G, 15th Floor, at 450 Golden Gate Avenue in San Francisco, California.

//

//

Defendant's Motion to Dismiss
King v. FBI

1 This motion is made on the grounds that this Court lacks subject matter jurisdiction as to
2 Plaintiff's potential claim against the United States because she has not exhausted her administrative
3 remedies. Specifically, Plaintiff has not complied with the requirements of the FTCA in that she has
4 not made an administrative claim. *See* 28 U.S.C. § 2675. Accordingly, this case has been
5 prematurely filed and should be dismissed without prejudice for lack of subject matter jurisdiction.

6 This motion is based upon this Notice of Motion, the Declaration of Jennifer A. Wilson filed
7 herewith, all the papers and records currently on file in the above-captioned matter, and any
8 additional evidence and argument that this court may permit.

9 **II. PROCEDURAL POSTURE**

10 In Plaintiff's complaint, she claims property damage, intentional tort, and premises liability.
11 Plaintiff alleges that her home was repeatedly visited by F.B.I. agents, that garbage was thrown in her
12 back yard, a dead mouse was placed in her home, unlawful entry, and her phone reception was not
13 good. She claims that since December 31, 2006 through December 31, 2007 her place has been like
14 Grand Central Station.

15 Plaintiff filed this action on December 31, 2007 in San Francisco County Superior Court.
16 Plaintiff seeks damages in the amount of \$1,000,000.00. The United States Attorney's Office was
17 notified of the action by the Federal Bureau of Investigation and removed the action on April 11,
18 2008. Defendant has not been properly served as required by Rules of Civil Procedure Rule
19 4(i)(1)(A)(i)(ii).

20 **III. ANALYSIS**

21 **A. Legal Standards under Rules 12(b)**

22 A motion to dismiss under Rule 12(b)(1) tests the subject matter jurisdiction of the court. *See*,
23 *e.g.*, *Savage v. Glendale Union High School*, 343 F.3d 1036, 1039-40 (9th Cir. 2003), *cert. denied*,
24 541 U.S. 1009 (2004). A motion will be granted if the complaint, when considered in its entirety, on
25 its face fails to allege facts sufficient to establish subject matter jurisdiction. *Id.* at 1039 n.2.

26 //

27 //

28 //

1 A motion to dismiss under Rule 12(b)(6) “tests the legal sufficiency of a claim. A claim may
2 be dismissed only if ‘it appears beyond doubt that the Plaintiff can prove no set of facts in support of
3 his claim which would entitle him to relief.’ *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001)
4 (quoting *Conley v. Gibson*, 353 U.S. 41, 45-46(1957)).

5 **B. Plaintiff Has Not Complied with the Requirements of the FTCA.**

6 The sovereign cannot be sued without its consent. *United States v. Sherwood*, 312 U.S. 584
7 (1941); *Gould v. U.S. Dept. of Health & Human Services*, 905 F.2d 738, 741 (4th Cir. 1990).
8 Moreover, the terms of that consent define a federal court's jurisdiction to entertain such suit. *United*
9 *States v. Testan*, 424 U.S. 392 (1976).

10 The FTCA is the exclusive waiver of sovereign immunity for actions sounding in tort against
11 the United States, its agencies and/or employees acting within the scope of their employment. *Smith*
12 *v. United States*, 507 U.S. 197 (1993) citing 28 U.S.C. §1346(b). All limits and conditions within the
13 FTCA are to be strictly construed in favor of the sovereign. *McNeil v. United States*, 508 U.S. 106
14 (1983); *United States v. Orleans*, 425 U.S. 807 (1976); *Thigpen v. United States*, 800 F.2d 393 (4th
15 Cir. 1986).

16 The United States is the only proper party Defendant in an FTCA action. 28 U.S.C.
17 § 2679(a); *Kennedy v. United States Postal Service*, 145 F.3d 1077 (9th Cir. 1998) (per curium).

18 Moreover, a key prerequisite to filing suit under the FTCA involves the presentation of an
19 administrative claim to the government within two years of the incident, *see* 28 U.S.C. § 2401 (b),
20 and that the federal agency either finally denies the claim or fails “to make final disposition of a claim
21 withing six months after it is filed. . .”, *see* 28 U.S.C. § 2675(a).^{1/}

22
23 Section 2675(a) states, in relevant part,

24 An action shall not be instituted upon a claim against the United States for money
25 damages for injury or loss of property or personal injury or death caused by the
26 negligent or wrongful act or omission of any employee of the Government while
acting withing the scope of his office or employment, unless the claimant shall
have first presented the claim to the appropriate Federal agency and his claim

27 //

28 //

1 Plaintiff's complaint should be dismissed. First, Plaintiff filed suit against the wrong
2 defendant, and second, the Court lacks subject matter jurisdiction over her claims. Specifically even
3 assuming the Plaintiff has or could stake a claim against the federal government, she has failed to
4 exhaust her administrative remedies requirement as required by the FTCA.

5 **IV. CONCLUSION**


6 This Court should dismiss Plaintiff's claim against the Federal Bureau of Investigation
7 because the agency is not the proper Defendant. See 28 U.S.C. § 2679. In addition, Plaintiff has
8 failed to file an administrative claim with the federal agency, as required by the FTCA. Accordingly,
9 Plaintiff's claim against the United States should be dismissed without prejudice for lack of subject
10 matter jurisdiction.

11 Respectfully submitted,

12 Dated: April 1st, 2008

JOSEPH P. RUSSONIELLO
United States Attorney

14 By:


Joann M. Swanson
Assistant United States Attorney

16
17
18
19
20
21
22
23
24
25
26
27 shall have been finally denied by the agency in writing and sent by certified or
28 registered mail. The failure of an agency to make final disposition of a claim
within six months after it is filed shall, at the option of the claimant any time
thereafter, be deemed a final denial of the claim for purposes of this section...

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee of the Office of the United States Attorney for the Northern District of California and is a person of such age and discretion to be competent to serve papers. The undersigned further certifies that she is causing a copy of the following:

1. **SPECIAL APPEARANCE DEFENDANT'S NOTICE OF MOTION AND MOTION TO DISMISS [FED. R. CIV. P. 12(b)];**
2. **DECLARATION OF JENNIFER A. WILSON SUPERVISORY SPECIAL AGENT FEDERAL BUREAU OF INVESTIGATION; and**
3. **[PROPOSED] ORDER GRANTING DEFENDANT'S MOTION TO DISMISS** to be served this date upon the parties in this action by placing a true copy thereof in a sealed envelope, and served as follows:

☒ **FIRST CLASS MAIL** by placing such envelope(s) with postage thereon fully prepaid in the designated area for outgoing U.S. mail in accordance with this office's practice.

☐ **CERTIFIED MAIL** by placing such envelope(s) with postage thereon fully prepaid in the designated area for outgoing U.S. mail in accordance with this office's practice.

☐ **PERSONAL SERVICE (BY MESSENGER)**

☐ **FEDERAL EXPRESS via Priority Overnight**

☐ **EMAIL**

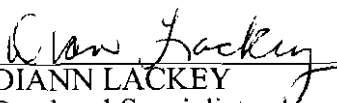
☐ **FACSIMILE (FAX)** Telephone No.: _____

to the party addressed as follows:

Phyllis J. King - In Pro Per
527 Vista Mar Avenue
Pacifica, California 94044

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 16th day of April 2007 at San Francisco, California.


DIANN LACKEY
Paralegal Specialist